Filed 9/29/03 P. v. De Luis Conti CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GRAHAM ROGER-LEE DE-LUIS-CONTI, Defendant and Appellant.	A095937 (Napa County Super. Ct. No. CR100660)

Defendant was convicted of multiple sexual offenses against a group of young girls and sentenced to a term of 121 years to life. On appeal, he challenges the sufficiency of the evidence and alleges instructional and sentencing error. We affirm.

BACKGROUND

Because of the nature of defendant's appellate contentions, we need not exhaustively recount the facts underlying most of the charges. In broad outline, over the summers of 1995 and 1996 defendant spent a number of weekends alone on his houseboat with his stepdaughters Kara P. and Dawn P., their cousin Jessica Z., and friends Chrystal T. and Shaine W. Defendant supplied the girls with marijuana and alcohol and engaged in various sexual acts with them.

We supply additional facts as necessary in our discussion of the specific issues raised on appeal.

DISCUSSION

I. *Substantial Evidence Supports The Conviction On Count 24*

A. *Background*

One summer night in 1995 defendant was on the houseboat with 14-year-old Kara and 13-year-old Chrystal. The girls had smoked marijuana and gone to sleep in the same bed. Defendant's sleeping area was on a couch directly across the room. Defendant called to Chrystal, telling her to wake up, come over and masturbate him. She refused. Defendant threatened to injure and rape her, then came over and lay down on his side between the girls. He touched Chrystal's breasts and digitally penetrated her vagina.

B. *Discussion*

The jury found defendant guilty of penetrating Chrystal's vagina with a foreign object, by force or violence, in violation of Penal Code sections 269, subdivision (a)(5) and 289, subdivision (a).[1] Defendant contends the evidence was insufficient to support the jury's finding that he used force as defined in *People v. Cicero* (1984) 157 Cal.App.3d 465. We reject the contention. Assuming the applicability of *Cicero*, sufficient evidence of force was introduced to support the conviction.

When sufficiency of the evidence is at issue, we must determine "whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt. [Citations.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) In making this determination, we " 'view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) This task is twofold. First, the issue must be resolved in light of the complete record. Second, we must determine whether the evidence of each of the essential elements is substantial. (*Id.* at pp. 576-577, italics omitted.) "Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid value [citation], it must be ever cognizant that ' "it is the exclusive province of the trial judge or jury to determine the credibility of

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[1] Unless otherwise indicated, all statutory citations are to the Penal Code.

a witness and the truth or falsity of the facts upon which a determination depends . . . .” ’ [Citations.] Thus, if the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness’s credibility for that of the fact-finder. [Citations.]” (*Barnes*, *supra*, at pp. 303-304.)

As relevant here, section 289, subdivision (a)(1) criminalizes foreign object penetration of the genital or anal openings of any person accomplished against the victim’s will by means of force or violence. To establish force within the meaning of the statute, the prosecution must show the defendant “used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” (*Cicero*, *supra*, 157 Cal.App.3d at p. 474; *People v. Kusumoto* (1985) 169 Cal.App.3d 487, 491; *People v. White* (1986) 179 Cal.App.3d 193, 200-203.)

Defendant contends the evidence of force was insufficient to satisfy the *Cicero* test. The prosecution disputes this contention and, relying on *People v. Young* (1987) 190 Cal.App.3d 248, argues the *Cicero* definition should be limited to the context of lewd touchings and not applied to foreign object penetration and other sexual crimes. We need not reach that latter question. Assuming *Cicero* applies, sufficient evidence supports the jury’s finding that defendant used substantially different or greater force than necessary to accomplish foreign object penetration.

Viewing the evidence in the light most favorable to the verdict, it shows that Chrystal physically tried to push defendant’s hand away, but that he overcame her resistance. Defendant contends these actions do not satisfy *Cicero*. Relying on *People v. Senior* (1992) 3 Cal.App.4th 765, he asserts that because the act of digital penetration “almost always involve[s] some physical contact other than genital, a modicum of holding and even restraining cannot be regarded as substantially different or excessive ‘force.’ ” (*Id.* at p. 774 [pulling victim back after she resisted oral copulation insufficient evidence of force to sustain conviction]; see also *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004 [grabbing and holding child’s arm while fondling her insufficient to sustain conviction for forcible lewd or lascivious acts with minor].)

His reliance is misplaced. As defendant acknowledges, substantial authority holds that pushing a victim's hand aside or overcoming her effort to pull her hand away from the defendant constitutes force beyond that necessary to accomplish the sex act itself. *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153, for example, held that pushing aside the victim's hand constituted force " 'substantially greater than that necessary to accomplish the lewd act itself.' " Similarly, in *People v. Babcock* (1993) 14 Cal.App.4th 383, the court held the jury could consider evidence the defendant overcame the victim's resistance when she attempted to pull her hand away from his crotch in assessing whether he used force to accomplish the lewd act. (*Id.* at p. 387.) *Senior*'s contrary analysis of force, moreover, has been soundly and convincingly criticized by other courts, including a different panel of the authoring court.[2] (*People v. Bolander* (1994) 23 Cal.App.4th 155, 160-161; see, e.g., *People v. Babcock*, *supra*, at p. 388; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1790.) Defendant's assertion that *Senior* "constitutes a more persuasive reading" of the force requirement is unpersuasive.

Finally, defendant attacks the jury's finding of force on the ground that it was Kara, not Chrystal, who testified about the hand pushing, suggesting that this court should overrule the jury's implicit determination that Kara's testimony was credible. That, patently, we cannot do. (*Barnes*, *supra*, 42 Cal.3d at pp. 303-304.)

II. *Count 21—Instructional Error On Admissions*

As to count 21, forcible oral copulation against Jessica Z., defendant asserts the trial court committed prejudicial error in failing to instruct sua sponte that the jury view with caution evidence of oral statements he made during the offense. This instruction, he maintains, would have applied to Kara's testimony that he threatened to kill Jessica unless she orally copulated him. The assertion fails.

In reviewing this claim "[w]e apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more

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2 The nature of the force requisite for forcible rape is before the Supreme Court in *People v. Griffin* (2002) 122 Cal.Rptr.2d 818, review granted 10/23/02, S109734.)

favorable to defendant had the instruction been given." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Under this standard, the court's failure to give the instruction, assuming it was error, was harmless. Defendant urges that the failure to give the cautionary instruction was prejudicial because Kara's testimony was critical to the prosecutor's showing of force. We disagree. First, the evidence of force was overwhelming even without Kara's testimony. Defendant had restrained the girls by tying their hands together above their heads and to a column on the houseboat. When Jessica initially refused to orally copulate him he held a butcher knife to her throat. After putting the knife down he grabbed a pair of scissors and held them to her side. Jessica kept pulling her head away from him, but he "grabbed her head from the back . . . and he pushed his penis into her mouth."[3]

Second, the trial court adequately instructed the jury on assessing the credibility of Kara's testimony. In light of Kara's testimony that she had lied to police about keeping a diary, the court at defendant's request instructed the jury to consider a witness's admission of untruthfulness in assessing her credibility (CALJIC No. 2.20) and that a witness who is willfully false in one part of his or her testimony is to be distrusted in others. (CALJIC No. 2.21.2) The jury was further instructed that although the testimony of one witness would be sufficient to prove a fact, the jury should "carefully review all the evidence upon which the proof of that fact depends" (CALJIC No. 2.27); that jurors "are the exclusive judges as to whether the defendant made an admission," (CALJIC No. 2.71); and that some proof of each element of the crime is required, independent of any admission made by the defendant outside the trial. (CALJIC No. 2.72.) In short, the jury had ample guidance on how to assess Kara's credibility. (See *Carpenter*, *supra*, 15 Cal.4th at p. 393; *People v. Castro* (1979) 99 Cal.App.3d 191, 196-197.) On this record, it is not reasonably probable that the omission of the cautionary instruction, if erroneous, was prejudicial.

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3 On this evidence, the jury found true an allegation that defendant had used a weapon in committing the

III. *Counts 15 and 16—Sentencing Error*

Counts 14, 15 and 16 also involve 14-year-old Jessica Z. After smoking marijuana and drinking one night in 1995, defendant told Jessica to sit by him. He pulled her onto his lap and fondled her breasts through her clothing, rubbed her vaginal area through her clothing, then fondled and squeezed her buttocks. These acts formed the basis of counts 14, 15 and 16, forcible lewd acts on a child. (§ 288, subd. (b)(1).) The trial count imposed a full consecutive eight-year term on each count.

Defendant contends the court erred in imposing mandatory full and consecutive sentences on counts 15 and 16 pursuant to section 667.6, subdivision (d). The error, he urges, lies in the fact that counts 15 and 16 "were committed on the 'same occasion' as count 14." As he notes, section 667.6, subdivision (d) was inapplicable because it requires full consecutive sentences for qualifying sex offenses involving the same victim if they occurred on *separate* occasions.

The contention fails. The record is clear that the court imposed sentence on counts 15 and 16 under section 667.6, subdivision (c), not section 667.6, subdivision (d). The difference, as defendant acknowledges, is critical. Under section 667.6, subdivision (c) the court has discretion to impose full consecutive terms if the crimes involve the same victim on the *same* occasion.

There can be no doubt here that the court imposed sentence under section 667.6, subdivision (c)'s discretionary rule. The prosecutor was very clear in requesting application of that provision: "[W]e are asking that those counts also be sentenced under section 667.6—in this case, subdivision (c). Not separate victims and not separate occasions, but nevertheless, ones deserving of this decisively more egregious punishment." The court was equally clear that while mandatory consecutive sentences under section 667.6, subdivision (d) applied to counts 11, 14 and 25, it was applying the discretionary provisions of section 667.6, subdivision (c) to counts 15 and 16: "First of all, the Court will be analyzing these from the prospective [*sic*] of Penal Code Section

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offense.

667.6(d) with regard to Count No. 11, Count No. 14, and Count No. 25. *The Court will be analyzing, with regard to Penal Code section 667.6(c), Counts 15, 16, and 21*." (Italics added.) It explained: "With regard to the next three counts—let me start with Penal Code Section 667.b(c) as being the basis for the Court analyzing this particular circumstance involving Jessica Z. as a circumstance as charged and as proved during the course of the trial as being a circumstance where, although it involves the same individual, as in Count 14, the Court finds that this is a circumstance where the Defendant had a reasonable opportunity to reflect upon his actions and, nevertheless, resumed sexually assaultive behavior. The Court finds a full straight and consecutive term should be imposed for this particular count. [¶] Turning to Count 16: The Court's analysis with regard to that circumstance is exactly the same. The Court makes the same finding concerning Count 16 as Count 15 with regard to the nature of 667.6(c) and the opportunity Defendant had to reflect and to, nevertheless, resume criminal activity on Jessica Z."

Notwithstanding this record, defendant maintains the court must in fact have applied section 677.6, subdivision (d) because it relied on the fact that defendant had a "reasonable opportunity to reflect [upon his actions] but, nonetheless, resumed sexually assaultive behavior," a relevant factor under subdivision (d). He reads too much into the court's sentencing reason. While the existence of a "reasonable opportunity" is indeed critical for sentencing under subdivision (d), it is also relevant to whether the crimes were "predominantly independent of each other", an appropriate criterion in considering whether to sentence concurrently under section 667.6, subdivision (c). (Cal. Rules of Court, rule 4.425(a)(1); *People v. Coelho* (2001) 89 Cal.App.4th 861, 887.) We therefore reject defendant's invitation to ignore the court's plain statement of intent to sentence under section 667.6, subdivision (c).[4]

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4 Alternatively, defendant asserts for the first time in his reply brief that the court's discretionary decision under subdivision (c) was not supported by substantial evidence. As defendant failed to raise this contention in his opening brief and has provided no good explanation for that failure, it is not properly before this court.

IV. *Constitutional Challenges to Section 667.6, subdivision (d)*

In a supplemental brief filed by permission of this court, defendant argues that section 667.6, subdivision (d) is facially unconstitutional in failing to provide for a jury trial on whether offenses were committed on "separate occasions," and that he was denied his constitutional right to a jury determination on that element. He now correctly concedes that the recent decisions in *Harris v. United States* (2002) 536 U.S. 545 and *Ring v. Arizona* (2002) 536 U.S. 584 definitively establish that there is no federal constitutional right to a jury trial on the "separate occasion" finding. Accordingly, we do not discuss these contentions further.

V. *CALJIC 17.41.1*

Defendant contends, also in his supplemental brief, that the court erred in instructing the jury in accordance with CALJIC No. 17.41.1. That instruction, the subject of considerable recent judicial attention, reads: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Defendant raises the now-familiar argument that the instruction violated his constitutional rights to a jury trial, a unanimous jury verdict and the jurors' rights to freedom of speech and association.

Our Supreme Court has rejected these contentions. (*People v. Engelman* (2002) 28 Cal.4th 436.) The right to trial by jury does not require "absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct," nor does it constitute "an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Id.* at p. 443.) A juror who proposes to reach a verdict without respect to the law or the evidence is subject to discharge. (*Ibid.*) Claims of misconduct may merit judicial inquiry, even though such inquiry may implicate the contents of deliberations. (*Ibid.*) As to the claim that the instruction violates the right to a unanimous verdict, CALJIC No. 17.41.1 "simply does not carry the devastating

coercive charge that we concluded [in *People v. Gainer* (1977) 19 Cal.3d 835] should make us 'uncertain of the accuracy and integrity of the jury's stated conclusion' and uncertain whether the instruction may have ' "operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency." ' " (*Id.* at p. 445.) In light of these principles, giving CALJIC No. 17.41.1 is not constitutional error. (*Id.* at pp. 444, 445.)

Notwithstanding this holding, the Supreme Court exercised its supervisory powers and directed that CALJIC No. 17.41.1 not be given in the future, citing concerns that the instruction might needlessly "induce jurors to expose the content of their deliberations." (*Engelman*, *supra*, 28 Cal.4th at p. 446.) No such exposure occurred in *Engelman*, and the Supreme Court denied relief. (*Id.* at p. 449.) Similarly, there is no basis for relief here. Nothing in the record suggests that the trial court was informed of a juror refusing to follow the law or that the challenged instruction affected the verdict. Defendant has failed to demonstrate error.

To the extent defendant asserts the instruction improperly eliminated the jury's power to nullify, that concern has been put to rest by the Supreme Court's holding in *People v. Williams* (2001) 25 Cal.4th 441 that jury nullification is not encompassed within the Sixth Amendment right to trial by jury.

VI. *Issues Improperly Raised In Defendant's First Supplemental Brief*

In addition to raising the two above points, defendant's supplemental brief presents a variety of additional challenges to his sentence, which he describes as "closely related" to issues raised in his original brief. Specifically, defendant (1) challenges the adequacy of proof as to counts 15, 16, 11, 21 and 25; and (2) contends that sentencing under section 667.6 was improper because the information did not allege the offenses were committed on "separate occasions" or that the prosecutor sought sentencing under that section.

We do not reach these contentions. In his application to file the supplemental brief, defense counsel explained that, upon substituting in as counsel, he had determined that defendant's original appellate attorney should have raised CALJIC No. 17.41.1 and

jury trial issues in the opening brief. Subsequently, defendant applied to file a further supplemental brief challenging the trial court's denial of his motion to unseal juror information. This court granted both applications. On neither occasion did defendant seek leave from this court to address the additional issues he now attempts to raise, in addition to those properly presented, in his supplemental briefing.

Rule 13 of the California Rules of Court directs that, with exceptions not present here, no supplemental briefs may be filed "except with the permission of the presiding justice." Defense counsel, who is plainly conversant with Rule 13's requirements, presents no justification for failing to seek such permission with respect to the "related" issues. Although the Attorney General has touched upon these issues in supplemental letter briefing, the issues have not necessarily been fully addressed, and we do not condone such an unstructured and potentially unfair method of presentation. As these points are accordingly not properly before this court, we decline to address them.

VII. *Juror Information*

Defendant asserts that the court erred in denying his post-trial motions for access to juror's addresses and phone numbers on the ground that he failed to present a prima facie showing of good cause to unseal personal juror information. The assertion fails.

A. *Background*

In a post-verdict motion to unseal juror information, defendant alleged that jurors had seen him chained and shackled; read "articles which were printed in the news papers;" listened "to conversation about the trial outside trial meetings, at places of employment, such as the jury member who works in the court house;" and that an alternate juror had made comments to her attorney indicating possible jury misconduct. The court denied the motion. As to the juror who worked at the court and the jury's possible view of defendant in restraints, the court noted that both issues had been "thoroughly investigated during the trial by Court and counsel" and did not constitute good cause to unseal personal juror information. "[T]he Court personally interviewed jurors in the presence of counsel and [defendant] concerning these two issues. There is nothing in [defendant's] motion or declaration to establish any basis for further inquiry."

As to the unidentified newspaper articles, the court properly found that this "blanket assertion, without any kind of specifics, cannot constitute a *prima facie* showing of good cause."

With respect to the alternate juror's comments to her attorney,[5] the court denied the request to unseal personal juror information but agreed to address a future request to unseal the information regarding the alternate juror. Defendant subsequently renewed his motion to unseal personal information as to all jurors based on the alternate's statements to defendant's investigator that "during a break [in] the trial one male juror had referred to the defendant as a 'sick puppy, " and that after the verdict a juror commented to her, "Yeah your [*sic*] right they were all probably lying but we still convicted him."

The court denied this request as well. "The two alleged statements, whether viewed separately or in their totality, do not establish a basis in the facts or the law to unseal confidential juror information. The statements, even viewed in the context of [defendant's] original motion, do not present a *prima facie* showing of good cause to unseal personal juror information under the facts presented or under the law."

B. *Discussion*

Section 237, subdivision (b) of the Code of Civil Procedure provides, in part, that: "Any person may petition the court for access to [juror] records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing *if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information*, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure." (Italics added.) "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate

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5 These comments came to light when the court met with the parties to determine if the attorney, Mr. Bishop, might serve as advisory counsel in this case. Bishop informed the court that, while he felt there was no conflict, one of his clients was an alternate juror in defendant's case and had called his office after the verdict to discuss "various things" including "her opinion on the jury system."

decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Ray* (1996) 13 Cal.4th 313, 343; see also *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322; Code Civ. Proc., § 237, subd. (b).)

There was no abuse of discretion. With respect to the allegations about the court employee and the jury's possible viewing of defendant in restraints, defendant does not dispute that both issues were "thoroughly investigated during the trial by Court and counsel" and thus "do not constitute 'good cause' or the 'necessary showing' required by law." Indeed, by explicitly "focusing" only on the remaining allegation, the alternate juror's reports of the "sick puppy" comment by another juror, defendant has, apparently abandoned these points as grounds for appeal.

What remains for our consideration is whether the court abused its discretion in finding the alternate's report did not constitute good cause to set a hearing. As the prosecutor noted, the "sick puppy" comment presents no inference or indication of improper or external influence. Nor does it compel the conclusion that the juror had made up his or her mind before hearing all of the evidence or was unable or unwilling to consider the evidence in light of the court's instructions. This is particularly so in light of the fact that the jury acquitted defendant on five counts. Rather, the court could reasonably view it as conveying only the juror's impression or emotional reaction at that moment to the evidence being presented at trial. Generally, of course, a juror's subjective thought process cannot be the basis of misconduct proceedings. (Evid. Code, §1150, subd. (a); see *People v. Cox* (1991) 53 Cal.3d 618, 694-695.) To the extent, if any, that defendant maintains the post-verdict comment about lying witnesses constituted good cause, we note that it fails for the same reason.

In sum, the court did not abuse its discretion in rejecting defendant's claim of good cause to unseal personal juror information. We therefore need not and do not address defendant's related contention that the alleged error violated his federal due process rights under the Fifth and Fourteenth Amendments.

DISPOSITION

The judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.